

1 THE HONORABLE JOHN C. COUGHENOUR

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT SEATTLE

10 ALICIA ARCHER, an individual,

11 Plaintiff,

12 v.

13 SONY INTERACTIVE ENTERTAINMENT,
14 a foreign limited liability corporation, and
15 SUCKER PUNCH PRODUCTIONS, a foreign
16 limited liability corporation,

Defendants.

CASE NO. C19-1979-JCC

ORDER

17 Pursuant to the parties' stipulation and proposed order (Dkt. No. 12), the Court ENTERS
18 the following order regarding the discovery of electronically stored information ("ESI"):

19 **A. General Principles**

20 1. An attorney's zealous representation of a client is not compromised by conducting
21 discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate
22 in facilitating and reasonably limiting discovery requests and responses raises litigation costs and
23 contributes to the risk of sanctions.

24 2. As provided in Local Civil Rule 26(f), the proportionality standard set forth in Fed.
25 R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further
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the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

B. ESI Disclosures

Within 30 days of entry of this Order, or at a later time if agreed to by the parties, each party shall disclose:

1. Custodians. The five custodians most likely to have discoverable ESI in their possession, custody, or control. The custodians shall be identified by name, title, connection to the instant litigation, and the type of the information under the custodian's control.

2. Non-custodial Data Sources. A list of non-custodial data sources (*e.g.*, shared drives, servers), if any, likely to contain discoverable ESI.

3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain discoverable ESI (*e.g.*, third-party email providers, mobile device providers, cloud storage) and, for each such source, the extent to which a party is (or is not) able to preserve information stored in the third-party data source.

4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

5. Foreign data privacy laws. Nothing in this Order is intended to prevent either party from complying with the requirements of a foreign country's data privacy laws, *e.g.*, the European Union's General Data Protection Regulation (GDPR) (EU) 2016/679. The parties agree to meet and confer before including custodians or data sources subject to such laws in any ESI or other discovery request.

C. ESI Discovery Procedures

1. On-site inspection of electronic media. Such an inspection shall not be required absent a demonstration by the requesting party of specific need and good cause or by agreement of the parties.

1 2. Search methodology. The parties shall timely confer to attempt to reach agreement
2 on appropriate search terms and queries, file type and date restrictions, data sources (including
3 custodians), and other appropriate computer- or technology-aided methodologies, before any
4 search effort is undertaken. The parties shall continue to cooperate in revising the appropriateness
5 of the search methodology.

6 a. Prior to running searches:

7 i. The producing party shall disclose the data sources (including
8 custodians), search terms and queries, any file type and date restrictions, and any other
9 methodology that it proposes to use to locate ESI likely to contain responsive and discoverable
10 information. The producing party may provide unique hit counts for each search query.

11 ii. The requesting party is entitled to, within 14 days of the producing
12 party's disclosure, add no more than 10 search terms or queries to those disclosed by the
13 producing party absent a showing of good cause or agreement of the parties.

14 iii. The following provisions apply to search terms / queries of the
15 requesting party. Focused terms and queries should be employed; broad terms or queries, such
16 as product and company names, generally should be avoided. A conjunctive combination of
17 multiple words or phrases (*e.g.*, "computer" and "system") narrows the search and shall count as
18 a single search term. A disjunctive combination of multiple words or phrases (*e.g.*, "computer"
19 or "system") broadens the search, and thus each word or phrase shall count as a separate search
20 term unless they are variants of the same word. The producing party may identify each search
21 term or query returning overbroad results demonstrating the overbroad results and a counter
22 proposal correcting the overbroad search or query. A search that returns more than 250 unique
23 documents, excluding families, is presumed to be overbroad.

24 b. Nothing in this order limits the producing party's ability to review the
25 search results for responsiveness, privilege, and confidentiality prior to production.

1 3. Format. The producing party shall produce ESI in either the format set forth in
2 Exhibit A or as follows:

3 a. ESI will be produced to the requesting party with searchable text, in a
4 format to be decided between the parties. Acceptable formats include, but are not limited to, native
5 files, multi-page TIFFs (with a companion OCR or extracted text file), single-page TIFFs (only
6 with load files for e-discovery software that includes metadata fields identifying natural document
7 breaks and also includes companion OCR and/or extracted text files), and searchable PDF.

8 b. Unless otherwise agreed to by the parties, files that are not easily converted
9 to image format, such as spreadsheet, database, and drawing files, will be produced in native
10 format.

11 c. Each document image file shall be named with a unique number (Bates
12 Number). File names should not be more than twenty characters long or contain spaces. When a
13 text-searchable image file is produced, the producing party must preserve the integrity of the
14 underlying ESI, *i.e.*, the original formatting, the metadata (as noted below) and, where applicable,
15 the revision history.

16 d. If a document is more than one page, the unitization of the document and
17 any attachments and/or affixed notes shall be maintained as they existed in the original document.

18 e. ESI will be produced in the following format: single- page images and
19 associated multi-page text files containing extracted text or with appropriate software load files
20 containing all information required by the litigation support system used by the receiving party.

21 f. The full text of each electronic document shall be extracted (“Extracted
22 Text”) and produced in a text file. The Extracted Text shall be provided in searchable ASCII text
23 format (or Unicode text format if the text is in a foreign language) and shall be named with a
24 unique Bates Number (*e.g.*, the unique Bates Number of the first page of the corresponding
25 production version of the document followed by its file extension).

1 g. Metadata fields. The following metadata fields are the only metadata that
2 the parties are required to collect and produce, to the extent it is reasonably accessible and non-
3 privileged: document type; custodian and duplicate custodians (or storage location if no
4 custodian); author/from; recipient/to, cc and bcc; title/subject; email subject; file name; file size;
5 file extension; original file path; date and time created, sent, modified and/or received; and hash
6 value. The list of metadata type is intended to be flexible and may be changed by agreement of
7 the parties, particularly in light of advances and changes in technology, vendor, and business
8 practices.

9 h. De-duplication. The parties may de-duplicate their ESI production across
10 custodial and non-custodial data sources after disclosure to the requesting party, and the duplicate
11 custodian information removed during the de-duplication process tracked in a duplicate/other
12 custodian field in the database load file.

13 i. Email Threading. The parties may use analytics technology to identify
14 email threads and need only produce the unique most inclusive copy and related family members
15 and may exclude lesser inclusive copies. Upon reasonable request, the producing party will
16 produce a less inclusive copy.

17 j. Hard-Copy Documents. If the parties elect to produce hard-copy
18 documents in an electronic format, the production of hard-copy documents will include a cross-
19 reference file that indicates document breaks and sets forth the custodian or custodian/location
20 associated with each produced document. Hard-copy documents will be scanned using Optical
21 Character Recognition technology and searchable ASCII text files will be produced (or Unicode
22 text format if the text is in a foreign language), unless the producing party can show that the cost
23 would outweigh the usefulness of scanning (for example, when the condition of the paper is not
24 conducive to scanning and will not result in accurate or reasonably useable/searchable ESI). Each
25 file will be named with a unique Bates Number (*e.g.*, the unique Bates Number of the first page
26 of the corresponding production version of the document followed by its file extension).

1 **D. Preservation of ESI**

2 The parties acknowledge that they have a common law obligation, as expressed in Fed. R.
3 Civ. P. 37(e), to take reasonable and proportional steps to preserve discoverable information in
4 the party's possession, custody, or control. With respect to preservation of ESI, the parties agree
5 as follows:

6 1. Absent a showing of good cause by the requesting party, the parties shall not be
7 required to modify the procedures used by them in the ordinary course of business to back-up and
8 archive data; provided, however, that the parties shall preserve all discoverable ESI in their
9 possession, custody, or control.

10 2. The parties will supplement their disclosures in accordance with Fed. R. Civ. P.
11 26(e) with discoverable ESI responsive to a particular discovery request or mandatory disclosure
12 where that data is created after a disclosure or response is made (unless excluded under Sections
13 (D)(3) or (E)(1)-(2)).

14 3. Absent a showing of good cause by the requesting party, the following categories
15 of ESI need not be preserved:

- 16 a. Deleted, slack, fragmented, or other data only accessible by forensics.
- 17 b. Random access memory (RAM), temporary files, or other ephemeral data
18 that are difficult to preserve without disabling the operating system.
- 19 c. On-line access data such as temporary internet files, history, cache,
20 cookies, and the like.
- 21 d. Data in metadata fields that are frequently updated automatically, such as
22 last-opened dates (see also Section (E)(5)).
- 23 e. Back-up data that are duplicative of data that are more accessible
24 elsewhere.
- 25 f. Server, system or network logs.
- 26 g. Data remaining from systems no longer in use that is unintelligible on the

1 systems in use.

- 2 h. Electronic data (*e.g.*, email, calendars, contact data, and notes) sent to or
3 from mobile devices (*e.g.*, iPhone, iPad, Android devices), provided that
4 a copy of all such electronic data is automatically saved in real time
5 elsewhere (such as on a server, laptop, desktop computer, or “cloud”
6 storage).

7 **E. Privilege**

8 1. A producing party shall create a privilege log of all documents fully withheld from
9 production on the basis of a privilege or protection, unless otherwise agreed or excepted by this
10 Agreement and Order. Privilege logs shall include a unique identification number for each
11 document and the basis for the claim (attorney-client privileged or work-product protection). For
12 ESI, the privilege log may be generated using available metadata, including author/recipient or
13 to/from/cc/bcc names; the subject matter or title; and date created. Should the available metadata
14 provide insufficient information for the purpose of evaluating the privilege claim asserted, the
15 producing party shall include such additional information as required by the Federal Rules of
16 Civil Procedure. Privilege logs will be produced to all other parties no later than 30 days after
17 delivering a production unless an earlier deadline is agreed to by the parties.

18 2. Redactions need not be logged so long as the basis for the redaction is clear on the
19 redacted document.

20 3. With respect to privileged or work-product information generated after May 13,
21 2019, the date litigation was reasonably anticipated, parties are not required to include any such
22 information in privilege logs.

23 4. Activities undertaken in compliance with the duty to preserve information are
24 protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

25 5. Pursuant to Fed. R. Evid. 502(d), the production of any documents in this
26 proceeding, inadvertent or otherwise, shall not, for the purposes of this proceeding or any other

1 federal or state proceeding, constitute a waiver by the producing party of any privilege or
2 protection applicable to those documents, including the attorney-client privilege, attorney work-
3 product protection, or any other privilege or protection recognized by law, unless expressly
4 waived by the producing party for the purposes of this proceeding. Information produced in
5 discovery that is protected as privileged or work product shall be immediately returned to the
6 producing party, and its production shall not constitute a waiver of such protection.

7 IT IS SO STIPULATED, THROUGH COUNSEL OF RECORD.
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9 DATED: February 21, 2020

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14 DATED: February 21, 2020

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1 Pursuant to stipulation, IT IS SO ORDERED.

2 DATED this 10th day of March 2020.

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6 John C. Coughenour
7 UNITED STATES DISTRICT JUDGE
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